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Attorneys for Defendant LifeSecure Insurance Company

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

MARK SCOTT and
MERRILEE SCOTT,

Plaintiffs,

v.

LIFESecure INSURANCE COMPANY,

Defendant.

**DEFENDANT'S RULE 26(a)(2)
EXPERT DISCLOSURE**

CASE No. 2:15-cv-00197-CW-DBP
Magistrate Judge Evelyn J. Furse

Pursuant to Fed. R. Civ. P. 26(a)(2), Defendant LifeSecure Insurance Company ("Defendant") designates and discloses the following expert witness who may be called upon to testify at trial or otherwise:

R. Bryan Tilden
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52 Redgate Road
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Mr. Tilden is a principal of Tilden and Associates who has over 42 years experience in the insurance and risk management industry. Mr. Tilden's opinions are set forth in the attached expert report, along with supporting materials pursuant to Fed. R. Civ. P. 26(a)(2)(B).

Mr. Tilden may be asked to respond to testimony of certain witness offered at the time of trial or in deposition, including, but not limited to, the testimony of the Plaintiffs. Defendant reserves the right to designate any and other expert witnesses for the purposes of rebuttal depending on additional reports provided by the Plaintiffs. Defendant further reserves the right to supplement and amend the designations up to and including the time of trial, expressly reserves the right to withdraw any expert at any point.

Dated: February 18, 2016

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the attached Defendant's Rule 26(a)(2) Disclosure was served upon the parties listed below via U.S. mail on the 18th day of February, 2016.

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UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

MARK SCOTT, an individual; and MERILEE)	
SCOTT, and individual)	
)	
Plaintiffs,)	
)	
vs.)	NO.: 2:15-cv-00197-CW-DBP
)	
LIFESECURE INSURANCE COMPANY, a)	Judge Clark Waddoups
Michigan Corporation,)	
)	
Defendant.)	
_____)	

Prepared by R. Bryan Tilden, CPCU, CLU, ARM, ALCM, ChFC, CIC, SCLA
TILDEN AND ASSOCIATES
Pittsboro, North Carolina
February 18, 2016

PREFACE

I, R. Bryan Tilden, have been engaged by counsel for LifeSecure Insurance Company (“LifeSecure”) to review certain materials relating to the non-renewal of Policy Number PH02118 (“Policy”) and to, in summary, provide an opinion (a) relating to the features and benefits of the Policy, all as described in detail in this report and (b) relating to a proper calculation of the Plaintiffs’ damages, if any, caused by the non-renewal of the Policy.

I have over 42 years’ experience in the insurance and risk management industry as an author, broker, consultant, underwriter, drafter of policy forms and endorsements, teacher, historian, claim examiner and consultant for both insureds and insurers. I have placed business, as a retail and surplus lines broker representing the insured, in the international insurance market, including coordinated placements with Lloyd’s brokers, Lloyd’s syndicates, United States, Canadian, British and European insurance companies. I have handled claims, progressing from small claims to claims over \$1,000,000. I have worked with Lloyd’s brokers, Lloyd’s syndicates, United States, Canadian, British, Bermudian and European companies in the drafting, underwriting and placement of insurance policies, both marine and non-marine, and in the adjustment of losses, including life and health insurance. I teach the construction, drafting, underwriting, adjusting and analysis of insurance policies throughout the United States, Canada, the Caribbean, Bermuda and the European Union. I have testified in the United States and London regarding the above subject matter. I am familiar with the custom and practices of the international insurance marketplace, including the London, European, Caribbean, Canadian, Bermudian and United States markets.

My curriculum vitae along with a list of publications and cases I have testified in as an expert in the last five years is attached hereto as *Exhibit A*. The facts and data I considered in forming my opinions expressed in this report are listed in the documents provided section of this

report. My billing rate to LifeSecure for study and testimony in this matter is \$250 an hour.¹ The opinions expressed herein are to a reasonable degree of professional certainty. ***I reserve the right to amend or supplement this report should any additional discovery occur.***

DOCUMENTS PROVIDED

1. Complaint;
2. Answer;
3. LifeSecure Responses to Discovery;
4. Scott Responses to Discovery;
5. LifeSecure Supplemental Responses to Discovery;
6. LifeSecure Responses to Second Set of Discovery;
7. LifeSecure Initial Disclosures;
8. Scott Initial Disclosures;
9. Scott 00001 – 00309;
10. LifeSecure 00001 – 00114;
11. Deposition of Mark Scott and exhibits;
12. Deposition of Merilee Scott and exhibits;
13. Deposition of Sam Houk and exhibits; and
14. HBE Forensics LLC Expert Report.

¹ No portion of my compensation is dependent upon the result of this litigation.

HISTORY

The original policy was issued to Plaintiffs February 10, 1987. It was non-renewed March 10, 2014, after initial notice of the non-renewal was given on October 30, 2013. The reason for the non-renewal was that the contract did not comply with the requirements of the Affordable Care Act (ACA). Plaintiffs seek past premiums of at least \$60,000, despite the fact that they received \$226,006.02 in benefits through 2010.² In addition, the difference in premium and out-of-pocket costs between the LifeSecure policy and the alternative ACA compliant policy purchased by the Plaintiffs is being sought from LifeSecure until both Plaintiffs reach 65.

OPINIONS

- I. LifeSecure followed the custom and practice of the insurance industry in deciding not to make changes required to make “grandfathered” 1987 policy ACA compliant.

Insurance is based on the law of large numbers. This mathematical principle states that as the number of similar but independent exposure units increases, the relative accuracy of predictions about future outcomes (losses) also increases. The record shows that 22 policies were in effect at the time the decision was made to non-renew the health insurance policies instead of revising the policies to comply with ACA mandated provisions for grandfathered policies. There were only two policies in Utah, the jurisdiction involved in this litigation. While the record shows that some states, including Utah, extended the date to make existing ACA policies compliant, other jurisdictions did not, thereby reducing the already minuscule number of policies in the risk pool.

Empirical probability (a posteriori probability) is based on actual experience through historical data or from the observation of facts. As the 1987 Policy provisions did not comply with

² Houk Exhibit #19.

the ACA requirements which materially altered coverages under health policies, this application would be inappropriate. In other words, even attempting to use data regarding other health insurance policies, to the extent it could be obtained, would not provide empirical data to allow for a reasonable setting of future rates since essentially all existing policies would be ACA compliant, and therefore materially different in benefit structure.

Theoretical probability is based on theoretical principals rather than actual experience. Due to the unchanging nature of coin tosses or dice throws, in some situations it may be preferable to empirical probability. Theoretical probability are not applicable or available in most situations that insurance professionals analyze, particularly the analysis of potential risk. As a result, empirical probability must be used.

Insurance policies are designed and priced based on the following six characteristics:

1. Pure risk – Involves pure risk, not speculative risk.
2. Fortuitous losses – Subject to fortuitous loss from the insured's standpoint.
3. Definite and measurable – Subject to losses that are definite in time, cause, and location that are measurable.
4. Large number of similar exposure units – One of a large number of similar exposure units.
5. Independent and not catastrophic – Not subject to a loss that would simultaneously affect many other similar loss exposures; not catastrophic.
6. Affordable – Premiums that are economically feasible.

Here, with a Utah exposure base of two, the principle of a large number of exposure units is missing in order for the risk to be priced according to accepted reasonable practice. Further, the affordability of premiums comes into question. Even if the policies were revised to the minimum requirements of the ACA grandfather provisions, there would have to be a premium adjustment approved by the Utah Department of Insurance (as well as other applicable Insurance Departments), and because of the small number of policies, there would be no data on which such rate adjustment could be based.

Of the types of insurance regulation, rate regulation receives the most public attention. The three major goals of rate regulation are to ensure that the rates are adequate, not excessive, and not unfairly discriminatory. Adequate means that the premium should be high enough to pay all claims and expenses for that type of insurance in order to maintain insurer insolvency. Not excessive means that the insurer should not earn excessive or unreasonable profits. Regulators have considerable latitude and discretion in determining whether rates are excessive. Not unfairly discriminatory refers to fair and consistent discrimination, the basis of insurance rating. Not every exposure is the same and insurers may typically take into account differences among insureds that effect the risk.

LifeSecure would have followed the above principles of insurance in making the decision not to revise the policies to comply with the ACA mandates for grandfathered policies. If they had revised the policies, based on two policies in Utah, there would be no empirical data to present to the Utah Department of Insurance to establish the new premium based on the new benefits. The uncertainty of future losses for a small number of policies would require enough collected

premium for the two policies to cover future losses, expenses, and a reasonable profit for LifeSecure.

Market price includes spread of risk in the rate making function. With a large number of exposure units, the risk of catastrophic loss is mitigated. Not all policy holders would contract a dread disease or sustain an accident in any particular policy period. Only a portion would have a large loss, but the spread of risk stabilizes the market price. With two policies involved, the pricing has to be higher than market price due to the lack of spread of risk. Because of the risk pool of two policies in Utah, more likely than not the new premium would not be approved by the Utah regulators, as the premium would have to be higher than market price due to the lack of a large number of exposure units and the uncertainty in the risk described above.

The ACA has established more rate regulation in addition to state regulation: Rate Review and the 80/20 rule. Rate Review protects policyholders from unreasonable rate increases. Insurance companies must now publicly explain any rate increase of 10% or more before raising the premium.³ The 80/20 Rule generally requires insurance companies to spend at least 80% of the money they take in from premiums on health care costs and quality improvement activities. The other 20% can go to administrative, overhead, and marketing costs.⁴

³ This does not apply to grandfathered plans.

⁴ Insurance companies selling to large groups must spend at least 85% of premiums on care and quality improvement.

II. HBE Forensics LLC analysis failed to consider, among other things, the benefit level changes when calculating damages.

The damage calculations performed by HBE did not take account or adjust for the increased benefits provided by either a Bronze or Silver plan. HBE did not indicate which Bronze plan was utilized for the pricing model. The Plaintiffs obtained a Silver Plan, and presumably the Bronze Plan was included by HBE for comparison purposes. The following analysis indicates the plan number utilized, with the Silver plan the one procured by the Plaintiffs:

	LifeSecure	Bronze Plan S40A1997	Silver Plan S302018
Maximum Benefit	\$1,000,000	Unlimited	Unlimited
Deductible – Accident	\$50	\$3,500	\$3,500
Deductible – Sickness 2015	\$500	\$3,500	\$3,500
Deductible – Sickness 2016	\$500	\$4,500	\$3,500
Deductible –Emergency Room	\$50	\$500 co-payment after deductible	100% after deductible
Co-payments	20% ⁵	30%	0%
Medical, Surgical, Hospice, Emergency Admissions	\$1,000 day maximum	70% after deductible	100% after deductible
Anesthesia	30% of surgical charge	70% after deductible	100% after deductible
Mammography	None	Covered ⁶	Covered ⁷
Maternity	None	70% after deductible	100% after deductible
Skilled Nursing Facility	None	70% after deductible	100% after deductible ⁸
Rehab Therapy	None	\$40 co-payment after deductible	100% after deductible ⁹
Sick Office Visits	After Deductible	\$25 co-pay after deductible	100% after deductible
Preventive Care	None	Covered ¹⁰	Covered ¹¹

⁵ After deductible, when co-payments reach \$4,500, then 100% up to policy maximums.

⁶ See Exhibit B.

⁷ Ibid.

⁸ 60 days per year.

⁹ 40 days per year.

¹⁰ See Exhibit B.

¹¹ Ibid.

	LifeSecure	Bronze Plan S40A1997	Silver Plan S302018
Tier I Drugs	After Deductible ¹²	\$10 per prescription	100% after deductible
Tier II Drugs	After Deductible	30% co-pay after deductible	100% after deductible
Tier III Drugs	After Deductible	50% co-pay after deductible	100% after deductible
Allergy Tests	None	\$40 co-pay after deductible	100% after deductible
Self-inflicted Injury	None	70% after deductible	100% after deductible
Infertility	None	\$1,500 year ¹³	100% after deductible ¹⁴
Obesity Surgery	None	Not covered	100% after deductible
Foot Care	None	70% after deductible	100% after deductible
Acts of Aggression	None	70% after deductible	100% after deductible
Pediatric Eye Exam	None	\$40 co-pay after deductible	100% after deductible
Pediatric Glasses & Contact Lenses	None	70% after deductible	100% after deductible
Chiropractic	\$300 year	Not covered	100% after deductible ¹⁵
Drug & Alcohol Treatment	\$1,000 year	\$25 co-pay after deductible	100% after deductible
Mental Health	50% ¹⁶	70% after deductible	100% after deductible
TMJ Services	None	\$2,000 lifetime	\$2,000 lifetime
Motorcycle Injuries	\$10,000 occurrence	70% after deductible	100% after deductible
Organ Transplant	\$25,000	70% after deductible	100% after deductible
Ambulance	75 mile limit	70% after deductible	100% after deductible

As the table above demonstrates, the coverage procured by the Plaintiffs had greater benefits than the LifeSecure policy. HBE did not account for the benefit level change in its analysis. As an example, both the Silver and Bronze plans cover preventive care at 100% with no deductible. Based on this benefit, Mrs. Scott obtained a mammogram that was fully covered as

¹² Accident and sickness only, no preventive.

¹³ \$1,500 per year, \$5,000 lifetime.

¹⁴ \$1,500 per year, \$5,000 lifetime.

¹⁵ 15 visits per year

¹⁶ \$1,500 year, \$10,000 lifetime maximum.

required by the ACA. Attached as *Exhibit B* is a listing of preventive care benefits available under the Plaintiff's current policy, with no out-of-pocket cost to the Plaintiffs.

HBE also failed to account for the income tax implications of the transaction. Plaintiffs purchased the LifeSecure policy with after-tax dollars. In using after-tax dollars, the deductibility would be the portion of medical expenses that exceeded 7½ % of their adjusted gross income. HBE acknowledged that the current Silver Plan was purchased by the Plaintiff's wholly owned company, and the record reflects the company pays the premium.¹⁷ Purchasing health insurance through the company would utilize pre-tax dollars since the payment would be an expense to the company. HBE stated "I assumed that insurance purchased through the company is equivalent to the Scott's purchasing the insurance individually". HBE failed to adjust the claimed damages by the income tax implications, thereby overstating and inflating the damages.¹⁸

HBE also failed to adjust the damages for the health savings account (HSA). While the damage calculations did not include the contribution to the HSA, there is a significant income tax advantage in utilizing a HSA. Generally, any contributions to the HSA can be made with pre-tax dollars or such contributions are deductible. The benefits statement in this case indicates that the business made the contribution, and is therefore not taxed as earned income to the Plaintiffs. The LifeSecure product was not designed for nor compliant with the HSA requirements as it is not a high deductible plan. Failing to make this adjustment is another instance where the claimed

¹⁷ See Scott000075.

¹⁸ HBE also failed to indicate how premium paid by the company, which is a separate independent entity, results in damages to the individual Plaintiffs.

damages are inflated and overstated since Plaintiffs can pay all out-of-pocket costs assumed by HBE with pre-tax dollars under their current plan.

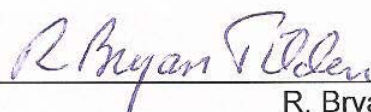
HBE, in their damages report, further stated that the maximum out-of-pocket would be \$1,400 per year. Only one sickness deductible was taken per year of \$500. This does not account for the internal limits in the LifeSecure policy, such as \$1,000 per day for hospital expenses, and therefore the analysis of out-of-pocket costs is totally speculative. If hospitalization had occurred, then the out-of-pocket cost under the LifeSecure policy would be significantly higher than under the Plaintiffs' current coverage. Becker's Hospital CFO indicates that in Utah, the average cost per inpatient day in 2015 was \$2,843.¹⁹ This does not include doctor or ancillary charges. The Kaiser Family Foundation reports that the average per capita spending for health care in Utah in 2009 was \$5,031.²⁰

As previously discussed, the ACA requires at least 80% of the premium collected be utilized for payment of losses. Plaintiffs complain that they have to pay a higher premium, but chose to ignore the benefit changes. The Silver Plan they procured does have a higher premium, but includes greater benefits. Because of the 80% loss ratio requirement under the ACA, one can deduce the Silver Plan premium is commiserate with the increased benefits, and would be representative of market price in relation to the benefit level. Again, HBE in their damages report does not take into account the benefit level change in this highly regulated ACA compliant product, and only desires to focus on the change in premium.

¹⁹ <http://www.beckershospitalreview.com/finance/average-cost-per-inpatient-day-across-50-states.html>.

²⁰ <http://kff.org/other/state-indicator/health-spending-per-capita/?state=UT>.

The HBE report is deficient for the above reasons and most critically fails to reasonably attempt to calculate actual damages since the differential in benefits is not addressed. The report is based on an assumption that no services limited or excluded under LifeSecure would occur, even though paid claims of \$226,006.02 through 2010 were made by under the Policy, highlighting that Plaintiffs' had significant claims in the past. Further, the HBE report simply assumes the premium under the LifeSecure policy would remain the same even though, in order to remain in force, the policy would have to be changed to add the additional benefits required by the ACA. This also raises a final point, an ACA compliant policy would not be the same policy originally issued to the Plaintiffs, as it would be changed in material respects.



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Grading Panel Member, Insurance Institute of America

National Faculty Member, Society of Certified Insurance Counselors

Faculty, ACORD Power of Change Workshop, 1995 to present

Faculty, Independent Insurance Agents Virtual University,
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Ernest F. Young Education Award, 1988

North Carolina Independent Agent of the Year, 1989

Frequent contributor the *The John Liner Letter*

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The CPCU Society. "A Guide to the CGL Aggregate Limits",
<http://www.cpcusociety.org/learning/campus/how.shtml> , 1999
The CPCU Society, "A Guide to the Motor Carrier Act",
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EXHIBIT B

All ACA health plans must cover the following list of preventive services without charging a copayment or coinsurance. This is true even if the yearly deductible has not been met.

1. Abdominal aortic aneurysm one-time screening for men of specified ages who have ever smoked
2. Alcohol misuse screening and counseling
3. Aspirin use to prevent cardiovascular disease for men and women of certain ages
4. Blood pressure screening
5. Cholesterol screening for adults of certain ages or at higher risk
6. Colorectal cancer screening for adults over 50
7. Depression screening
8. Diabetes (Type 2) screening for adults with high blood pressure
9. Diet counseling for adults at higher risk for chronic disease
10. Hepatitis B screening for people at high risk, including people from countries with 2% or more Hepatitis B prevalence, and U.S.-born people not vaccinated as infants and with at least one parent born in a region with 8% or more Hepatitis B prevalence.
11. Hepatitis C screening for adults at increased risk, and one time for everyone born 1945 – 1965
12. HIV screening for everyone ages 15 to 65, and other ages at increased risk
13. Immunization vaccines for adults — doses, recommended ages, and recommended populations vary:
 - Diphtheria
 - Hepatitis A
 - Hepatitis B

- Herpes Zoster
- Human Papillomavirus (HPV)
- Influenza (flu shot)
- Measles
- Meningococcal
- Mumps
- Pertussis
- Pneumococcal
- Rubella
- Tetanus
- Varicella (Chickenpox)

14. Lung cancer screening for adults 55 - 80 at high risk for lung cancer because they're heavy smokers or have quit in the past 15 years

15. Obesity screening and counseling

16. Sexually transmitted infection (STI) prevention counseling for adults at higher risk

17. Syphilis screening for adults at higher risk

18. Tobacco Use screening for all adults and cessation interventions for tobacco users

Covered preventive services for women:

1. Breast cancer genetic test counseling (BRCA) for women at higher risk
2. Breast cancer mammography screenings every 1 to 2 years for women over 40
3. Breast cancer chemoprevention counseling for women at higher risk
4. Cervical cancer screening for sexually active women
5. Chlamydia infection screening for younger women and other women at higher risk

6. Domestic and interpersonal violence screening and counseling for all women
7. Gonorrhea screening for all women at higher risk
8. HIV screening and counseling for sexually active women
9. Human Papillomavirus (HPV) DNA test every 3 years for women with normal cytology results who are 30 or older
10. Osteoporosis screening for women over age 60 depending on risk factors
11. Rh incompatibility screening follow-up testing for women at higher risk
12. Sexually transmitted infections counseling for sexually active women
13. Syphilis screening for women at increased risk
14. Tobacco use screening and interventions
15. Well-woman visits to get recommended services for women under 65

Services for pregnant women or women who may become pregnant:

1. Anemia screening on a routine basis
2. Breastfeeding comprehensive support and counseling from trained providers, and access to breastfeeding supplies, for pregnant and nursing women
3. Contraception: Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling, as prescribed by a health care provider for women with reproductive capacity (not including abortifacient drugs). This does not apply to health plans sponsored by certain exempt “religious employers.”
4. Folic acid supplements for women who may become pregnant
5. Gestational diabetes screening for women 24 to 28 weeks pregnant and those at high risk of developing gestational diabetes
6. Gonorrhea screening for all women at higher risk

7. Hepatitis B screening for pregnant women at their first prenatal visit
8. Rh Incompatibility screening for all pregnant women and follow-up testing for women at higher risk
9. Syphilis screening
10. Expanded tobacco intervention and counseling for pregnant tobacco users
11. Urinary tract or other infection screening